

NORTHERN DISTRICT OF TEXAS

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CLERK, U.S. DISTRICT COURT

By _____ Deputy

**Norma McCorvey, formerly known as
JANE ROE,**

Plaintiff,

V.

WILLIAM “BILL” HILL,
Dallas County District Attorney,

Defendant.

§

**CIVIL ACTION No.
3:03-CV-1340-N
(formerly 3-3690-B and
and 3-3691-C)**

**MOTION FOR RECONSIDERATION AND TO AMEND ORDER
DENYING RULE 60 MOTION**

TO THE HONORABLE COURT:

NOW COMES, NORMA MCCORVEY, formerly known in this Court as Jane Roe, the Plaintiff herein (hereinafter referred to as “Plaintiff”), and respectfully requests reconsideration of her Rule 60 Motion which was denied for lack of timeliness on June 19, 2003 and to amend this Court’s Order under Rule 59(e). In addition, the Court ruled that the Rule 60 Motion does not require a three-judge court and reconsideration is also requested of that decision.

1. Pursuant to the court's inherent equity power and Federal Rules of Civil Procedure, Rule 59(e), Plaintiff files this Motion to reconsider the Court's decision in this

case of June 19, 2003. Regardless of whether this Motion is referred to as a “Motion for Reconsideration” or a “Motion to Amend or Alter” the final Order of this Court, it is properly filed under Rule 59(e).¹ Plaintiff hereby makes this Motion within the ten-day deadline and seeks reconsideration on errors of law and fact and manifest injustice.² Plaintiff objects to the decision being made prior to the convening of a three-judge court and by this Motion does not waive her objection to her jurisdictional complaint.

FACTUAL HISTORY AND PROCEDURAL BACKGROUND

2. On June 17, 1970, a three-judge court issued a ruling in this cause declaring the Texas abortion laws that prohibited abortions except to save the life of the mother unconstitutional.³ On January 22, 1973, the United States Supreme Court affirmed this Court’s judgment.⁴ On the same day, the United States Supreme Court also ruled in a companion case to *Roe, Doe v. Bolton*.⁵

3. On June 17, 2003, Plaintiff filed a Rule 60 Motion for Relief from Judgment. That Motion included a request for a three-judge court, request for evidentiary hearing and oral argument, provided case law and authorities for its Motion, and details of the changes in both legal and factual conditions that have occurred in the last few years including changes occurring in 2003. In addition, the Motion and Supporting Brief included over 5,000 pages of affidavit evidence from Norma McCorvey, with over 1,000 affidavits of post-abortive women, and affidavits from scientific and medical experts.

¹ Bass v. United States Dep’t of Agriculture, 211 F.3d 959 (5th Cir. 2002).

² Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000)(stating grounds for order Rule 59(e) as the need to correct clear error or prevent manifest injustice).

³ Roe v. Wade, 314 F. Supp. 1217 (1970)(hereinafter “District Court Roe”).

⁴ Roe v. Wade, 410 U.S. 113 (1973)(hereinafter “Roe”).

4. Two days later, on June 19, 2003, this Court issued its Order denying the Rule 60 Motion. The Order stated that the Rule 60 Motion does not require a three-judge court and that Plaintiff did not bring her Motion within a reasonable time.⁶

5. This Motion for Reconsideration respectfully seeks reconsideration of these issues based on errors of law and facts and manifest injustice. The Court should have granted Plaintiff's Rule 60 Motion because:

- (a) the Motion was filed within a reasonable time period;
- (b) the Court should have ruled in the alternative that a three-judge court was required and referred it to that court;
- (c) other procedural issues are not a bar to Plaintiff's Motion;
- (d) Plaintiff was denied basic due process by a denial of a hearing or an opportunity to respond; and,
- (e) the Court should have granted the Motion based on the evidence because there was substantial evidence of change in factual and legal conditions to find that prospective application was unjust.

REASONABLE TIME

6. Plaintiff respectfully contends that this Court has mischaracterized her Motion. The characterization of Plaintiff's Motion is important. It is not based on "newly discovered evidence." Such a motion must be filed within a very short period of time and may affect the justice or injustice of the original judgment. However, the Rule 60

⁵ 410 U.S. 179 (1973)(hereinafter "Doe")

⁶ Order Denying Rule 60(b) Motion at 1 (June 19, 2003).

Motion is a much more rare but still appropriate form of relief. It is based on changes in factual conditions and/or legal conditions which make a judgment, that may have once been just at the time the decision was entered, no longer just due to changed factual and legal conditions.⁷ In such a case, the Motion should not be filed until the factual and/or legal conditions have changed to such a degree that “adherence to that decision would undoubtedly work a ‘manifest injustice’.”⁸ The Court should temper finality with justice,⁹ and a litigant should not be penalized for waiting for factual and legal conditions to be changed so substantially that they would meet the standard in Rule 60 that it is no longer “equitable that the judgment should have prospective application.” “Because Rule 60(b) is remedial, discretion of the district court to deny a Rule 60(b) motion is limited by significant policy considerations.”¹⁰ The reasoning is that the court’s power in a Rule 60 Motion has been defined as a “grand reservoir of equitable power to do justice in a particular case.”¹¹ To this end, the Rule 60 Motion should be “construed liberally to do substantial justice.”¹²

⁷ See *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

⁸ *Id.* at 236.

⁹ *Stipelcovich v. Sand Dollar Marine*, 805 F.2d 599 (5th Cir. 1986). The court stated: “The rule attempts to strike a balance between two conflicting goals, the finality of judgments and the command of the court to do justice. Thus, ‘although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.’” *Id.* at 604 (citations omitted).

¹⁰ *In re Roxford Foods, Inc.*, 12 F.3d 875, 881 (9th Cir. 1993).

¹¹ *Woods v. Kenan*, 173 F.3d 770, 780 (10th Cir.), *cert. denied*, 528 U.S. 878 (1999); *Pierce v. Cook & Co., Inc.*, 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976).

¹² *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977)(stating the “purpose of the motion is to permit the trial judge to reconsider such matters so that he can correct obvious errors or injustices...” “*Id.* at 736. In *Fackelman*, the court indicated that the district court properly denied the Rule 60 Motion because appellant could have raised the issues via appeal but had failed to do so. *Id.* at 737. This is not the case in Plaintiff Norma McCorvey’s request for relief under Rule 60.

7. The United States Supreme Court has rejected the mere passage of time as the standard when there have been significant changes in factual or legal conditions.¹³ “The court cannot be required to disregard significant changes in law or fact if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.”¹⁴ In fact, a “court errs when it refuses to modify an injunction or consent decree in light of such changes.”¹⁵ Therefore, lapse of time is not determinative,¹⁶ but the court must make a flexible application depending on the facts of each case.¹⁷

8. The Motion must be brought within a “‘reasonable time’ ... which depends upon the particular facts and circumstances of the case.”¹⁸ Thus, the court cannot apply a strict time limitation because the “particular facts and circumstances” of each case will be

¹³ Although this Court cited examples of weeks and months and not decades as prohibitive, both the United States Supreme Court and lower federal courts have allowed cases longer than that due to the surrounding circumstances of the case that would justify a Rule 60 Motion. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997)(12 years); *United States v. Board of School Commissioners*, 128 F.3d 507 (7th Cir. 1997)(30 years); *Rufo Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)(10 years); *Railway Employees v. Wright*, 364 U.S. 642 (1961)(12 years); *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755(6th Cir. 2002)(28 years); *Alliance to end Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001)(20 years); *United States v. Karahalias*, 205 F.2d 331 (2d Cir. 1953)(17 years); *Federal Deposit Ins. Corp. v. Castle*, 781 F.2d 1101 (5th Cir. 1986)(2 years); *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001)(20 years); *United States v. Columbia Artists Mg.*, 662 F. Supp. 862 (S.D.N.Y. 1987)(32 years). In desegregation cases, the federal courts have also granted relief from decrees issues decades ago due to changes in social and factual conditions. See, e.g., *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001)(30 years); *People Who Care v. Rockford Board of Education*, 246 F.3d 1073 (7th Cir. 2001) (30 years); *Manning v. School Board of Hillsborough*, 244 F.3d 927 (11th Cir. 2001)(30 years); *NAACP v. Duval County School*, 273 F.3d 960 (11th Cir. 2001)(41 years); *United States v. Texas*, 158 F.3d 299 (5th Cir. 1998)(27 years); *Lee v. Butler County Board of Education*, 183 F. Supp. 2d 1359 (M.D. Ala. 2002)(39 years).

¹⁴ *Agostini v. Felton*, 521 U.S. 203, 215 (1997)(quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)).

¹⁵ *Id.*.

¹⁶ *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986)(stating the lapse of specific period of time between entry of judgment and ruling of the motion for relief is not determinative but depends on the circumstances), *cert. denied*, 482 U.S. 905 (1987).

¹⁷ *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 931 (5th Cir. 1976) (stating reasonable time by its nature invites flexible application depending upon the facts in each case).

¹⁸ *Traveler's Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994); *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 932 (5th Cir. 1976); *In re Pacific Far East Lines, Inc.*, 889 F.2d 242 (9th Cir. 1989).

different, thereby requiring an analysis of when those facts and circumstances changed. Without making that assessment, this Court concluded that based merely on the passage of time that Plaintiff's Motion "was not made within a reasonable time due to the length of time alone."¹⁹ Plaintiff respectfully submits that this was clear error. Plaintiff also submits that the appellate courts have criticized lower courts for failing to carefully consider each motion on its merits as recently indicated by the Court of Appeals for the Fifth Circuit:

We notice that the district judge in this matter, like some other district judges in this circuit, has the custom of usually, or even always, prohibiting litigants from filing motion for reconsideration or relief, such as those contemplated by FED. R. CIV. P. 59 and 60. No judge has that authority.

Accordingly, we direct the judge in this case and others in this circuit, to entertain post-judgment motions as contemplated by the rules. Moreover, the districts must carefully consider each such motion on its merits, without begrudging any party who wishes to avail himself of the opportunity to present such motions in accordance with the rules of procedure and with the standards of professional conduct.²⁰

9. In her Motion, Plaintiff explained valid reasons for the length of time. Courts have denied Rule 60 motions which could have been brought earlier, but the movant gave no valid reasons for delay.²¹ Unlike these cases, Plaintiff gave substantial evidence in its Original Motion and Supporting Brief on why it would not have been reasonable to file this Motion sooner.²² Her entire Motion is based on the assertion of changed factual and

¹⁹ Order Denying Rule 60(b) Motion at 6 (June 19, 2003).

²⁰ *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 502 (5th Cir. 2000)(emphasis added).

²¹ *See, e.g., Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 66 (1st Cir. 2003)(looking at six year delay between entry of default judgment and bringing Rule 60 motion without movants offering reason for delay) *First Republic Bank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992)(plaintiff had sixty days to appeal the decision, but did not take steps to do so);

²² Following is evidence from Plaintiff's original supporting brief and motion attesting as to why it would not have been reasonable to file this motion sooner: Changes in law:

- (a) Since its original ruling in *Roe*, the Supreme Court has significantly undermined the legitimacy of that decision through its decisions in *Webster v. Reproductive Services*, *Planned Parenthood v. Casey*, and *Washington v. Glucksberg*. Motion, page 7-9, paragraph 15-18. Brief, pages 8-9.
- (b) Recent changes in the law of federalism would now justify returning the decision whether or not to allow abortion to the individual states. Motion, pages 9-10, paragraphs 19-20. Brief, pages 8-15.

legal circumstances which necessarily implies the passage of time. It was not until very recently that Plaintiff was able to discern a significant development in scientific knowledge and law,²³ and therefore, it was an abuse of discretion to deny the motion.²⁴ Furthermore, Plaintiff had to wait until the law had significantly changed to justify an attempt to overturning the 1973 judgment.²⁵ To manifest injustice means to become clear and obvious, not a vague or shadowy showing. After it became clear and manifest, Plaintiff required time to gather such evidence to meet the threshold condition of Rule 60(b).²⁶

10. Alternatively, the Court rejected Plaintiff's Motion asserting that the issue was not pled and proven.²⁷ However, throughout the Motion and Supporting Brief, Plaintiff

(c) The overwhelming majority of states now permit some form of legal recovery for the loss of a child in the womb. Motion, page 10, paragraph 21. Brief, pages 17-19.

(d) Under recently enacted "Baby Moses" laws, women in 40 states may be relieved from the burdens of motherhood since the state will assume the responsibility of raising the child. Motion, page 12, paragraph 22. Brief, pages 21-24.

Changes in Factual Conditions:

(a) Since 1973 there has been an explosion of relevant scientific and medical knowledge. Motion, page 14, paragraph 25. Brief, pages 25-27.

(b) New knowledge reveals that the abortion industry does not adequately protect women, nor provide women with the protections of a true doctor-patient relationship. Motion, page 14, paragraph 26. Brief, pages 27-32.

(c) New evidence now exists to show the physical and mental consequences of abortion on women. Motion, pages 15-16, paragraphs 27-29. Brief, pages 32-39.

(d) New facts have been revealed regarding the decision made in *Doe v. Bolton*, the companion case to *Roe*, showing that severe fraud was committed on the court in that case. Motion pages 16-17, paragraph 30. Brief, pages 41-42.

²³ The United States Supreme Court stated in *Roe* that it was unable "to arrive at any consensus ...in the development of man's knowledge..." *Roe v. Wade*, 510 U.S. 113, 181 (1973). There has been a gradual development of scientific knowledge coupled with the gradual implementation of new law which makes this an extraordinary piece of litigation. Furthermore, neither Plaintiff nor the court can ascertain a precise moment when the factual and legal conditions changed so dramatically as to make *Roe* manifestly unjust.

²⁴ *Clark v. Burkle*, 570 F.2d 824, 832 (8th Cir. 1978)(denying hearing is abuse of discretion and noting that "this is not an ordinary run of the mill piece of litigation").

²⁵ *See Agostini v. Felton*, 521 U.S. 203, 212 (1997)(waiting twelve years to bring Rule 60 motion because it took that long for the evolving changes in law to become apparent).

²⁶ *Marderosian v. Shamshak*, 170 F.R.D. 335, 338 (D. Mass. 1997)(holding that Rule 60(b) is "a vehicle for 'extraordinary relief'" and that moving party "must give the trial court reason to believe that vacating the judgment will not be an empty exercise"). *See attached Affidavit of Allan Parker on the difficulty of gathering evidence, Appendix to the Motion, Tab A.*

²⁷ Order Denying Rule 60(b) Motion at 7 (June 19, 2003).

details the changes in both the factual and legal conditions that have occurred. These changes have occurred as recently as 2003. For example, one factual condition that has changed since 1973 is the whole state of man's scientific knowledge regarding the humanity of the child. The humanity of the child was unknown in 1973 as even the United States Supreme Court recognized in *Roe*.²⁸ This factual condition has not become known until quite recently with advances in scientific knowledge;²⁹ but neither Plaintiff nor the court can really say with exact certainty when that point in man's knowledge was crossed. The change in factual conditions has been an evolving process with an explosion of medical and scientific knowledge as well as advances in technology in recent years. Such knowledge and advances were discussed in Plaintiff's Motion and Supporting Brief and would have been presented at an evidentiary hearing. Furthermore, this case is totally unlike the typical tort or fraud case where some bit of knowledge about the fraud or some other easily established fact becomes known at some exact point in time, and then the litigant must act promptly. As the United States Supreme Court recognized in its most recent decision on the issue, the humanity of the child was at that time still a matter of some controversy with irreconcilable points of view.³⁰ Many may still dispute the point Plaintiff is making. Plaintiff has not waited until there was absolute consensus on the point, but only until she could prove to the court with a substantial development of medical and scientific knowledge that the decision in her case has

²⁸ The Court stated: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. 113, 181 (1973). Furthermore, as recently as 2002, the court has acknowledged that it is a question of fact. *Acuna v. Turkish*, 354 N.J. Super. 500, 808 A.2d 149 (2002).

²⁹ See Appendix to this Motion, Tab D.

³⁰ *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

become manifestly unjust.³¹ To do otherwise would be merely a matter of Plaintiff's speculation and opinion and not medical and scientific knowledge that the court should consider. Plaintiff's personal opinions and speculation are not controlling in the Rule 60 Motion; only the changes in the factual and legal conditions that make the judgment no longer equitable in prospective application are controlling.

11. Other changes in the factual conditions include the real life experiences of the women who have had abortions. At the time of *Roe*, the Supreme Court could only make assumptions as to the effect on women or whether there would be a normal doctor-patient relationship between the woman and the abortionist. Now, the court can read the sworn statements of the physical, emotional, and psychological harm that occur to women who have abortions.³² As the affidavits to the Motion and Supporting Brief attest, the women have not been able to deal with the issues for decades after the abortion.³³ Medical knowledge is now able to confirm what the women have experienced --- that women cannot deal with these traumatic circumstances until years later.³⁴ Therefore, it has taken time to deal with their circumstances and to be able to testify as to the effects of abortion. In light of these factual circumstances, Plaintiff's Motion was made within a reasonable amount of time.

12. In addition to the changes in factual conditions, there have been significant legal changes that justify Plaintiff's Rule 60 Motion. As discussed in Plaintiff's Rule 60 Motion and Supporting Brief which is incorporated herein, the United States Supreme

³¹ In *Carhart*, the United States Supreme Court discussed the "significant medical authority supports the proposition..." *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000).

³² See Affidavits by the over 1,000 post abortive women at Tab B of the Original Motion.

³³ See Affidavits in Tab D and E of the Original Motion; see also Affidavit of Dr. Burke in Support of this Motion, Appendix, Tab B and Affidavit of Dr. Reardon in Support of this Motion, Appendix, Tab C.

Court has, over time, continued to restrict and undermine the legitimacy of *Roe v. Wade*. These cases have included, but are not limited to, *Webster v. Reproductive Services*,³⁵ *Planned Parenthood v. Casey*,³⁶ and *Washington v. Glucksberg*.³⁷ Even in its most recent ruling, the United States Supreme Court has recognized that "...this Court, in the course of a generation, has determined and then redetermined" what the basic constitutional protections are in the area of abortion and how they should be applied in particular circumstances.³⁸

13. Similarly, in recent years, there have been significant changes in the law of federalism. Plaintiff's Original Motion and Supporting Brief discuss this issue in detail. However, it is sufficient to say at this juncture that significant changes were made between 1995 and 2000.³⁹ During this period, commentators across the country have been split on such issues as whether the United States Supreme Court was serious about expanding federalism, how it would be impacted by the fragile 5-4 split on the Court, what the parameters would be.⁴⁰

14. In addition to changes in the decisional law, there have been significant changes in statutory law. Most notably are the statutory provisions that allow a mother to drop off an unwanted child with no threat of criminal prosecution.⁴¹ In 2003, at least forty states now have such provisions. This is a legal change that gives women

³⁴ See attached Affidavit of Dr. Burke. The Affidavit of Dr. Burke explains that it can take women decades to recognize their grief, seek healing, and then overcome political and social stigmas in order to be able to speak out about the pain they have suffered from aborting a child.

³⁵ 492 U.S. 490 (1989).

³⁶ 505 U.S. 833 (1992).

³⁷ 521 U.S. 702 (1997).

³⁸ *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

³⁹ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

alternatives to abortion that were not available until just recently. In the majority of states, this was not available until 2001.⁴²

FACTORS CONSTITUTING “REASONABLE TIME”

15. In addition, the courts have outlined the factors for determining whether Plaintiff filed the Rule 60 Motion within a reasonable time.⁴³ The first factor for determining what is a reasonable time is “the practical ability of the litigant to learn earlier of the grounds relied upon.”⁴⁴ In 1973, the United States Supreme Court held that those trained in the respective disciplines of medicine, philosophy, and theology were unable to arrive at any consensus as to when life begins.⁴⁵ Even in the year 2000, the United States Supreme Court still did not know when human life begins recognizing the “controversial nature of the problem” and stating that there are “irreconcilable points of view.”⁴⁶ It is clear that even in recent years the United States Supreme Court has struggled with the issue even with its access to the current medical and scientific information. On the other hand, Plaintiff, an uneducated person,⁴⁷ would not have known or have been capable of gathering this evidence to present to the Court. For Plaintiff, as well as the medical, scientific, and legal communities, it has been a developmental process with changes in factual and legal conditions not fully coming to fruition until recently. Therefore, Plaintiff

⁴⁰ See generally, J. Harvie Wilkinson III, *The 2000 Justice Lester W. Roth Lecture: Federalism for the Future*, 74 S. CAL. L. REV. 523, 539-40 (2001)(stating the balance between national and state authority is “one of the new century’s defining domestic struggles” and the answers are “neither absolute nor simple.”).

⁴¹ See Plaintiff’s Original Rule 60 Motion at fns 42 and 43 discussing these statutes.

⁴² There was one state in 1999; 13 more in 2000; 18 more in 2001; 7 more in 2002; and 1 more so far in 2003.

⁴³ See *Traveler’s Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404 (5th Cir. 1994).

⁴⁴ *Id.* at 1410 (*quoting* *Ashford v. Stewart*, 657 F.2d 1053, 1055 (9th Cir. 1981).

⁴⁵ *Roe v. Wade*, 410 U.S. 113, 181 (1973).

⁴⁶ See *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

⁴⁷ See Plaintiff’s Affidavit at Tab A of the Original Rule 60 Motion.

did not have the “the practical ability ... to learn earlier of the grounds relied upon,” thereby meeting the first factor.

16. The abortion industry hides the true facts from individuals such as Norma McCorvey.⁴⁸ Although the United States Supreme Court in *Roe v. Wade* assumed that there would be a normal doctor-patient relationship between the women and the abortionists,⁴⁹ the real life experiences of the women who have had abortions, and the testimony of individuals who have worked in abortion clinics demonstrates that the abortion industry does not adequately protect women.⁵⁰ It is only years later that the women realize that they were not properly informed of the physical, emotional, and psychological effects of abortion.⁵¹

17. The second factor in determining whether Plaintiff filed the Rule 60 Motion within a reasonable time is whether there is prejudice to the other parties.⁵² There is, of

⁴⁸ See Affidavit of Plaintiff Norma McCorvey, attached to the Original Motion in the Appendix, Tab A, pp. 1-14; see also the Affidavits of more than one thousand Post-Abortive Women, attached to the Original Motion in the Appendix, Tab B, pp. 15-1410; the Affidavit of Theresa Burke, Ph.D., attached in the Original Motion in the Appendix, Tab D, pp. 1422-1667; the Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., Appendix, Tab E, pp. 1805-4307; Client Intake Records for Pregnancy Care Centers, attached to the Original Motion in the Appendix, Tab F, pp. 4308-5188; Affidavit of Carol Everett, former abortion provider, attached to the Original motion in the Appendix, Tab G, pp. 5189-5196.

⁴⁹ *Roe v. Wade*, 410 U.S. 113, 166 (1973).

⁵⁰ See Affidavit of Plaintiff Norma McCorvey, attached to the Original Motion in the Appendix, Tab A, pp. 1-14; see also the Affidavits of more than one thousand Post-Abortive Women, attached to the Original Motion in the Appendix, Tab B, pp. 15-1410; the Affidavit of Theresa Burke, Ph.D., attached in the Original Motion in the Appendix, Tab D, pp. 1422-1667; the Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., attached to the Original Motion in the Appendix, Tab E, pp. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., Appendix, Tab E, pp. 1805-4307; Client Intake Records for Pregnancy Care Centers, attached to the Original Motion in the Appendix, Tab F, pp. 4308-5188; Affidavit of Carol Everett, former abortion provider, attached to the Original motion in the Appendix, Tab G, pp. 5189-5196.

⁵¹ See Affidavits of the Post Abortive Women, Appendix to the Original Motion, Tab B.

⁵² *Traveler's Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994). Even assuming arguendo that the Motion was not filed as promptly as it might have been, the courts will allow it where there is no detriment to the opposing party. See *Federal Deposit Ins. Corp. v. Castle*, 781 F.2d 1101 (5th Cir. 1986)(allowing motion because there was no detrimental reliance on part of opposing party); *In re Pacific Far East Lines*, 889 F.2d 242 (9th Cir. 1988)(allowing motion because there was no prejudice to opposing party).

course, no prejudice to the District Attorney Dallas County since Norma McCorvey is now agreeing with his 1970 position in the lawsuit that he has the authority under the Constitution to prosecute under the Texas Criminal Abortion Statute. In fact, the Dallas County District Attorney's Office has neither agreed to nor opposed the Motion. If the interests of his office were adversely affected, he would have opposed the Motion. The same is true for the State of Texas. The State certainly is not prejudiced by having a former adversary adopt its position. On the contrary, the State has the authority to protect women and children from abortion. The interests of the adverse parties are actually advanced rather than being prejudiced, and therefore, the second factor is met.

18. The third factor in determining whether Plaintiff filed the Rule 60 Motion within a reasonable time concerns the court's interest in finality.⁵³ It is certainly true that there is an interest in finality in any judgment. But when a decision of the United States Supreme Court is involved, as opposed to litigation between private parties, the Supreme Court has made it clear the mere passage of time, even up to twelve years,⁵⁴ is not a bar to seeking justice. Justice outweighs the interest in finality.⁵⁵ By analogy, this is also true regarding Rule 60(b)(4) motions.⁵⁶ Courts have repeatedly stated that there is no

⁵³ *Traveler's Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994).

⁵⁴ *See Agostini v. Felton*, 521 U.S. 203 (1997)(requiring Rule 60 after twelve years because it was no longer just); *see also Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)(allowing after ten years because it was no longer just); *Railway Employees v. Wright*, 364 U.S. 642 (1961)(allowing after twelve years).

⁵⁵ The courts determined that "[t]he general purpose of Rule 60(b) ...is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755 (6th Cir. 2002)(in striking the balance, justice outweighed finality with a judgment that was twenty-eight years old.) *accord Stipelcovich v. Sand Dollar Marine*, 805 F.2d 599, 604 (5th Cir. 1986)(finding the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.)"

⁵⁶ *See Jackson v. FIE, Corp.* 302 F.3d 515, 523 (5th Cir. 2002)(citing numerous primary and secondary authority).

time limit to Rule 60(b)(4).⁵⁷ Furthermore, the “doctrine of laches has no effect.”⁵⁸ Conversely, “no court has denied relief under Rule 60(b)(4) because of delay.”⁵⁹ Therefore, the third factor is met.

THREE-JUDGE COURT

19. This Court ruled that because “a single judge can entertain a post-judgment motion such as this, the Court declines to request ... a three-judge court.”⁶⁰ Plaintiff respectfully disagrees. Plaintiff agrees that the relevant provision is the pre-amendment version of 28 U.S.C. § 2284.⁶¹

20. Section 2284 begins by indicating that “Any one of the three judges of the court may perform ...” This presupposes that a three-judge court has been convened. In fact, a three-judge court had been convened in the original case of *Roe v. Wade*. However, at the present time, all three of those judges are deceased. Thus, it is necessary to reconvene a three-judge court as Plaintiff requested in her prayer. Because this was not done, a single judge who is not part of the three-judge court does not have jurisdiction.

⁵⁷ See *id.* (reasoning that “the mere passage of time cannot convert an absolutely void judgment into a valid one”).

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649 n.6 (5th Cir. 1988)).

⁶⁰ Order Denying Rule 60(b) Motion at 2 (June 19, 2003).

⁶¹ The pre-amended version of 28 U.S.C. § 2284 provides: “Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A Single judge shall not appoint a master or order a reference, or hear and determine any application for interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The motion of the single judge shall be reviewable by the full court at any time before the final hearing.”

21. Section 2284 also states that: “A single judge shall not ... dismiss the action.”⁶² Plaintiff’s Rule 60 Motion with Supporting Brief and over 5,000 pages of affidavits was summarily dismissed in two days without any time for analysis on the merits, response from the defendant, hearing on the various issues, or rebuttal from Plaintiff. Plaintiff also respectfully submits that it was error to classify her Rule 60 Motion as “simply whether the prior judgment should be reopened. It does not address final relief on the merits...”⁶³ The third request in Plaintiff’s prayer was a request for “an order by the three-judge court that the judgment heretofore entered in favor of Plaintiff is vacated in light of changed legal and factual conditions because it is no longer just or equitable to give it prospective application.”⁶⁴ This request sought final relief on the merits.

22. Section 2284 also requires that “[t]he action of a single judge shall be reviewable by the full court at any time before the final hearing.” This is impossible since the request to reconvene the three-judge court was denied. Accordingly, the requirements of § 2284 were not met, and therefore, this Court did not have jurisdiction to rule on the Motion.

OTHER PROCEDURAL ISSUES

⁶² 28 U.S.C. § 2284; *see also* *Ex Parte Poresky*, 290 U.S. 30 (1933); *Police Officers’ Guide v. Washington*, 369 F. Supp. 543 (D.D.C. 1973); *New Jersey Chiropractic Assoc. v. State Bd. Of Medical Examiners*, 79 F. Supp. 327 (D.N.J. 1948); *Collins v. Bolton*, 287 F. Supp. 393 (N.D. Ill. 1968).

⁶³ Order Denying Rule 60(b) Motion at 3 (June 19, 2003).

⁶⁴ Plaintiff’s Original Rule 60 Motion at 17.

23. Although not part of this Court's decision, other procedural issues were raised in a footnote which will be briefly addressed.⁶⁵ At the time *Roe v. Wade* was originally decided, all of the procedural requirements had been met. The Rule 60 Motion merely seeks to re-examine the justice of the decision in light of the substantial changes in the factual and legal conditions that have occurred. No independent jurisdiction is needed to support a Rule 60(b) motion because the district court has continuing jurisdiction.⁶⁶

24. By the plain language of Rule 60(b),⁶⁷ Plaintiff has standing to bring this Motion because she was a party in the "final judgment, order, or proceeding..."⁶⁸ The courts have followed this plain reading of the rule.⁶⁹ In essence, there is no question that Norma McCorvey was and is a party. If the State tried to reopen the case, Plaintiff would certainly have standing to object if her views had not changed.

25. Mootness –The United States Supreme Court specifically addressed this issue in the original case.⁷⁰ The appellee argued that Roe's case was moot because she and all other members of the class were no longer pregnant.⁷¹ The Court rejected this argument

⁶⁵ Order Denying Rule 60(b) Motion at 8 (June 19, 2003).

⁶⁶ *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002)(quoting Moore's FEDERAL PRACTICE § 60.84[1][a](3d ed. 1997) that "It has been long established that no independent federal jurisdictional basis is needed to support a Rule 60(b) motion proceeding. A Rule 60(b) motion is considered a continuation of the original proceeding. "If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events.").

⁶⁷ Rule 60 states: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding..."

⁶⁸ FRCP 60(b).

⁶⁹ See *National Acceptance Co. v. Frigidmeats*, 627 F.2d 764, 766 (7th Cir. 1980). See generally 11 Charles Alan Wright, Arthur R. Miller, et al, FEDERAL PRACTICE AND PROCEDURE "Jurisdiction" § 2865 at 225-26 (West 1973)(stating it is well settled that one who was not a party lacks standing to bring a Rule 60(b) motion).

⁷⁰ *Roe v. Wade*, 410 U.S. 124 (1973).

⁷¹ *Id.* at 124.

stating “pregnancy provides a classic justification for a conclusion of nonmootness.”⁷² Plaintiff’s case was not moot in 1973 and it is not today. As a party, she has standing under the Rule 60 to bring this Motion. In addition, this Court concluded that “Whatever else it may or may not have done, the Supreme Court’s *Roe* decision thirty years ago ended this lawsuit between these parties.”⁷³ The holding in *Roe* is a continuing order and as such has not “ended.” The law in Texas still makes it a crime to abort a baby and the only reason that the law is not enforced is because of the continuing action in the *Roe* decision. The judgment is continuing with the continuing harmful daily effects on women and children as demonstrated in 5,437 pages of affidavits. Thus, the injustice continues on a daily basis and “injustice anywhere is a threat to justice everywhere.”⁷⁴

26. Judicial estoppel – The doctrine of judicial estoppel prohibits a party from assuming a contrary position merely because his interests have changed and especially if it prejudices another party.⁷⁵ The doctrine exists to protect the court against fraud and abuse and is discretionary in nature.⁷⁶ Plaintiff is not using inconsistent arguments to gain advantage in litigation. On the contrary, she is using the Rule 60 Motion to bring before the court changes of factual and legal condition that were unavailable when the case was originally litigated. Plaintiff is acting in good faith. In addition, there is no prejudice to another party. In a Rule 60 Motion, the change in factual and legal condition should be the primary concern and not the position of the parties.⁷⁷ The parties seeking relief had agreed to the judgment.⁷⁸ However, the Supreme Court said the change in law

⁷² *Id.* at 125.

⁷³ Order Denying Rule 60(b) Motion at 8 (June 19, 2003)..

⁷⁴ Martin Luther King, Letter from a Birmingham Jail (April 16, 1963).

⁷⁵ *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

⁷⁶ 18 Moore’s FEDERAL PRACTICE § 134.34 (*citing* *New Hampshire v. Maine*, 532 U.S. 742 (2001)).

⁷⁷ *Railway Employees v. Wright*, 364 U.S. 642 (1961).

⁷⁸ *Id.*

was the important fact which should guide the court, not the parties' position on the issue which has now changed.⁷⁹ The Court rejected the argument that the parties were bound even by the contractual agreement stating: "In short, it was the Railway Labor Act, [in this case the constitution], and only incidentally the parties, that the District Court served in entering the consent decree now before us ... the court must be free ... the parties have no power to require the court continuing enforcement of rights the statute no longer gives."⁸⁰

27. *Stare Decisis* – the United States Supreme Court specifically addressed the issue of *stare decisis* in *Agostini v. Felton*,⁸¹ the only case dealing with overturning prior Supreme Court rulings directly by Rule 60. It stated that "The *stare decisis* doctrine does not preclude this Court from recognizing the change in its law..."⁸² The Court went on to state that "*stare decisis* does not prevent us from overruling a previous decision where there has been significant change in or subsequent development of our constitutional law."⁸³ Nor does the "law of the case" doctrine apply where "adherence to that decision would undoubtedly work a 'manifest injustice'."⁸⁴

⁷⁹ *Id.* at 651-52.

⁸⁰ *Id.*

⁸¹ *Agostini v. Felton*, 521 U.S. 203 (1997).

⁸² *Id.* at 235.

⁸³ *Id.* at 235-36. In supporting this proposition, the Court quoted *United States v. Gaudin*, 515 U.S. 506 (1995) stating that *stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"; *Alabama v. Smith*, 490 U.S. 794, 803 (1989) indicating that "later development of ... constitutional law" is a basis for overruling a decision; and, *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) recognizing that a decision could be overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking."

⁸⁴ *Agostini v. Felton*, 521 U.S. 203, 236 (1997). In granting the Rule 60 Motion, the Court surmised that lower courts had "relied on a legal principle that had not withstood the test of time." *Id.* at 237. Certainly with the substantial factual and legal changes that have taken place and the Affidavits from over a 1,000 women who have testified that abortion hurts women, this Court should no longer rely on a legal principle and premise that abortion helps women because it has not withstood the test of time and experience.

28. Binding precedent – although under normal circumstances, United States Supreme Court precedent is binding upon this Court, a Rule 60 Motion means that there have been changes in the factual and legal conditions that demand a change in ruling to prevent injustice. That is why it was critical to have granted Plaintiff's repeated requests for a hearing --- fourteen in all --- from the Original Motion.⁸⁵ This Court has both the

⁸⁵ Following are the requests for evidentiary hearing in the Original Rule 60 Motion:

- (a) Request for Evidentiary Hearing and Oral Argument, Motion Page 3.
- (b) There has been a significant change in both the factual and legal landscapes surrounding this cause of action since the three-judge court's original ruling in this case. Motion Page 3, Paragraph 8.
- (c) In respect to the factual allegations, there must be a factual determination made, an opportunity for the presentation of evidence, and a development of a full record. A thorough hearing and development of an adequate fact-finding record is necessary in order for the Court, and in the event of an appeal, the Appellate Court, to make fully informed, intelligent and well-reasoned decisions. Appellate Courts do not conduct their own fact-finding hearings; they rely upon the lower courts to develop a proper record. Motion, Page 3, Paragraph 8.
- (d) The "threshold issue" 'is whether the factual landscape has changed since the Court's previous decision. Motion, Pages 3-4, Paragraph 9, Note 6. Factual matters should be decided by the trial court.' *Id.*
- (e) "The importance of these cases and the issues raised in Plaintiff's Motion for Relief From Judgment warrant a full and complete factual exposition of changed factual circumstances. Accordingly, pursuant to the Federal Rules of Civil Procedure, Plaintiff hereby requests an evidentiary hearing and oral argument before the three judge court in order to present the evidence and legal authorities now available to the Court." Motion, Page 4, Paragraph 9.
- (f) "Further the evidence as presented herein and as Plaintiff will present at the evidentiary hearing and oral argument as requested herein will show that the prior decision of the Court is clearly erroneous and would work a manifest injustice if applied prospectively." Motion, Page 5, Paragraph 12.
- (g) "New factual and legal evidence since the Court's decision in *Roe* and its companion case, *Doe*, as presented herein, in the Brief in Support of this Motion (incorporated herein by reference), and as will be presented to the Court at the evidentiary hearing requested by Plaintiff, now establishes that *Roe* and *Doe* have become and 'instrument of wrong'." Motion, Page 6, Paragraph 13, Note 16.
- (h) "Just as *Brown v. Board of Education*, note 1 247 US 483 (1954), overturned *Plessy v. Ferguson*, note 2, 163 U.S. 537 (1896), because subsequent facts show that 'separate but equal' had become inherently unjust, the new facts revealed in this Motion (in the Brief in support of this Motion and which will be revealed in full detail at the evidentiary hearing requested herein) demonstrate that *Roe* is no longer just but inherently unjust and provide the decisional basis for the Court to vacate their previous ruling in this cause." Motion, Page 13, Paragraph 23.
- (i) "New scientific and medical evidence and advances in technology since 1973, as described herein and *as will be more thoroughly presented at the evidentiary hearing* requested in this cause, clearly demonstrate that human life begins at conception and therefore the previous ruling in this cause should be vacated as it would be unjust to have prospective application." (Emphasis added) Motion, Page 13, Paragraph 24, 48 (See scientific medical analysis attached hereto in Appendix, Tab H, pp. 5197-5347; *see also* *Agostini v. Felton*, 521 U.S. 203 (1997).
- (j) "The Affidavits attached hereto, the Brief in support of this Motion, and the *testimony to be presented at the evidentiary hearing* requested herein reveals new factual evidence that the abortion industry does not provide women with the protections of a true doctor-patient relationship" Motion, Page 14-15, Paragraph 26. (emphasis added).

power and duty to hear that evidence of changed factual and legal conditions that would make a judgment unjust. It is also why the United States Supreme Court did not hesitate to grant the Rule 60 Motion in *Agostini* and overrule prior cases.⁸⁶

DUE PROCESS

29. Plaintiff asserts that there has been a violation of her fundamental due process rights to notice and an opportunity to be heard on the issue of timeliness as well as the other issues raised in her Rule 60 Motion. Plaintiff requested a full hearing on all of her evidence and all the issues in her Motion and submitted 5,437 pages of evidence to support her Motion. However, this Court decided Plaintiff's Motion in two days without giving the other parties an opportunity to respond and without giving Plaintiff an opportunity to respond to any objections to the Motion. If the normal course of litigation had ensued, the State of Texas and the District Attorney would have had twenty days to respond.⁸⁷ If either party had raised the issue of unreasonable time, Plaintiff would have had fifteen days to respond to their attack with replies, including argument and affidavits if necessary.⁸⁸

(k) "New factual evidence regarding the physical and medical consequences on women, the result ... is also available to the Court." Motion, Page 15, Paragraph 27.

(l) "In addition to the testimony of Plaintiff, Norma McCorvey, (both in the attached affidavit and her live testimony to be given at the evidentiary hearing requested herein), the attached women's affidavits from more than a thousand post-abortive women are the largest body of direct, sworn, factual evidence about the effects of abortion on women that has ever been presented to the United States Courts." Motion, Page 15-15, Paragraph 28. (Emphasis added).

(m) The Women's Affidavits, the Brief in Support of this Motion, and the new factual evidence, previously unavailable to the Court that will be presented at the evidentiary hearing requested herein reveal ... Items A through F. Motion, Page 16, Paragraph 29. (Emphasis added).

(n) "New facts previously unavailable to the Court have been revealed regarding the decision in *Doe v. Bolton* as well." Motion, Page 16-17, Paragraph 30.

⁸⁶ See the discussion in *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997).

⁸⁷ See Local Rule 7.1(e).

⁸⁸ See Local Rule 7.1(f).

30. This Court candidly acknowledges that its decision to deny the Motion was based on the mere passage of thirty years. This was clear error based on that premise as well as a denial of due process. However, evidentiary hearings are proper where it will assist the plaintiff as well as the appellate court.⁸⁹ A hearing would have given this Court the benefit of all the facts as well as the benefit to the appellate court in reviewing the case.

THE EVIDENCE PRESENTED WAS SUFFICIENT TO GRANT THE MOTION

31. In the alternative, Plaintiff asserts that this Court should have granted the Motion on its merits if the Court had jurisdiction as part of a three-judge court. The Motion, Supporting Brief, and 5,437 pages of affidavits and expert testimony were sufficient to grant the Motion and vacate the original judgment as Plaintiff requested in her prayer for relief. A district court has discretion not to hear oral testimony on motions.⁹⁰ It is not an abuse of discretion where “an evidentiary hearing was unnecessary in view of the detailed record...”⁹¹ In this case, Plaintiff provided the most detailed information that any court has received on the issue. It included its Motion and Supporting Brief with 5,437 pages of documentation. Especially in the absence of any objection by opposing parties, the Motion should have been granted. If the Court were

⁸⁹ *Clarke v. Burkle*, 570 F.2d 824 (8th Cir. 1978). The court explained: “We do not say that an evidentiary hearing in connection with the Rule 60(b) motion would necessarily have done the plaintiff any good. However, to have held the hearing would have consumed little time and effort, and in ruling upon the motion and amendments, the district court would have had the benefit of all of the facts, and we would have had the benefit of those facts in reviewing the action of the district court on appeal. In our opinion the action of the trial court in failing to hold a hearing legally amounted to an abuse of discretion, and we think that a hearing must now be held by the district court.” *Id.* at 832.

⁹⁰ *Gary W. v. State of Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979).

⁹¹ *Id.*

unconvinced by the massive evidence presented, due process would then require a hearing with evidence to address the Court's *sua sponte* objections.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Norma McCorvey respectfully prays for the following:

1. Grant this Motion for Reconsideration and set aside the Court's Order of June 19, 2003;
2. Grant the request for a three-judge panel;
3. Grant a hearing as requested in the Original Motion, or, in the alternative,
4. Grant Plaintiff's Rule 60 Motion based on the substantial accompanying evidence that to apply *Roe v. Wade* in the future would be unjust and inequitable.


APPENDIX:

Tab A	Affidavit of Allan E. Parker
Tab B	Affidavit of Dr. Theresa Burke, Ph.D.
Tab C	Affidavit of Dr. David C. Reardon, Ph.D.
Tab D	Summary of Medical and Scientific Research Concerning the Affects of Abortion on Women

Respectfully Submitted,

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and still doing business in Texas as
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CERTIFICATE OF SERVICE

A true copy of the above and foregoing has been hand-delivered to: The Texas Attorney General, 300 W. 15th Street, Austin, Travis County, and the District Attorney for Dallas County, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB 19, Dallas, Dallas County, Texas.

SIGNED on this the 3rd day of July, 2003.


Allan E. Parker, Jr.

CERTIFICATE OF CONFERENCE

I hereby certify that I contacted the office of Bill Hill, District Attorney for Dallas County, Texas on June 30, 2003. Bill Hill's Office stated that he neither agreed to or opposed the Motion.

On three separate working days since the Order of June 19, 2003, Plaintiff's counsel has left telephone messages with Attorney General Greg Abbott's scheduler or Texas Solicitor General Ted Cruz requesting a consultation concerning this Motion for Reconsideration, either in person or by telephone. Such a request was made for the last time on July 2, 2003, the day before the Motion was due. Plaintiff's counsel has received no response from the State of Texas at this time. Texas Solicitor General Ted Cruz was consulted prior to the original Rule 60 Motion and took the position that the State was not a party.

SIGNED on this the 3rd day of July, 2003.


Allan E. Parker, Jr.